petition

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 80-5053

JOHN HENRY QUINONES,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas, entered January 9, 1980, rehearing denied February 23, 1980.

QUESTIONS PRESENTED

1. Whether by sanctioning the trial court's refusal to instruct the jury that mitigating evidence may be considered upon the special issues which determine a death sentence under Texas law, the Court of Criminal Appeals eviscerated the very basis on which this Court upheld that law in Jurek vs. Texas, 428 U.S. 262 (1976), and thereby violated petitioner's rights under the Eighth and Fourteenth Amendments.

2. Whether V.A.C.C.P. Article 37.071 is unconstitutional in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and evidence of unadjudicated offenses and hearsay testimony may be presented for jury's consideration in support of the statutory issues and a death sentence.

3. Whether the prosecutors' intentional misrepresentation and the withholding of Petitioner's inculpatory tape recorded statement and the trial court's refusal to allow the discovery of them denied the Petitioner a fair and impartial trial required by the Fifth and Fourteenth Amendments of the U.S. Constitution and the effective assistance of counsel provided for by the Sixth and Fourteenth Amendments of the U.S. Constitution.

OPINIONS BELOW

The majority and dissenting opinons of the Texas Court of Criminal Appeals are reported at 592 S.W.2d 933 (1980) and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the U.S.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States

2. This case also involves the following provisions of Texas law:

Texas Code of Criminal Procedure Article 37.071. Procedure in Capital Case.

> (a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Texas Code of Criminal Procedure, Article 39.14. Discovery.

Upon motion of the defendant showing good cause therefore and upon notice to the other parties, the court in which an action is pending may order the State before or during trial of a criminal action therein pending or on trial to produce and permit the inspection and copying or photographing by or on behalf of the defendant of any designated documents, papers, written statement of the defendant, (except written

statements of witnesses and except the work product of counsel in the case and their investigators and their notes or report), books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the State or any of its agencies. The order shall specify the time, place and manner of making the inspection and taking the copies and photographs of any of the aforementioned documents or tangible evidence; provided, however, that the rights herein granted shall not extend to written communications between the State or any of its agents or representatives or employees. Nothing in this Act shall authorize the removal of such evidence from the possession of the State, and any inspection shall be in presence of a representative of the State.

STATEMENT OF THE CASE

Petitioner, JOHN HENRY QUINONES, age 19, at the time of the offense, was convicted and sentenced to die by a Houston, Texas jury in September of 1978 for the murder of Mohammed Ali Vahdat.[1/]

I. The Guilt Trial

The Texas Court of Criminal Appeals summarized the facts surrounding the crime as follows:

> On the afternoon of June 15, 1978, appellant and Robert Leal visited Simonia Sendejo at her home. Both Leal and Sendejo noticed that appellant was carryinga pistol. Appellant left the Sendejo house but soon returned in a neighborhood ice cream truck. The truck, which the appellant had hijacked, was being driven by Mohammed Ali Vahdat.
>
> Appellant waived Leal and Sendejo over to the truck and told them to get in. Appellant forced Vahdat to begin driving to a Houston-area Drive-In theater. During the drive, appellant pocketed the money in the truck, took Vahdat's money, watch and wallet, appropriated a tape player, and struck Vahdat with a gun. Appellant then told Leal to drive and forced Vahdat to the back of the truck. Appellant struck Vahdat repeatedly during the remainder of the trip to the theater.

1/ The record reflects that on July 20, 1978, approximately two months prior to trial, the Houston District Attorney's Office offered Petitioner a sentence of life imprisonment in return for a guilty plea. Record, Vol. X, pp. 5-7. The offer remained available until August 14 or 15, 1978, at which time the trial judge directed the plea bargaining come to a close because the case had been placed on the trial docket. Id. at 5-6. Petitioner declined to accept the plea. Id. at 7.

> At the theater, appellant told everyone that because he was on parole and did not want to return to jail he would have to kill Vahdat. Sendejo fled. Leal also abandoned the truck and saw it leave the theater. About thirty minutes later the appellant returned in the truck and informed Leal that he had sexually assaulted Vahdat. Other witnesses overhead Vahdat moaning and pleading for his life.
>
> Appellant ignored attempts by the theater staff to dissuade him from killing Vahdat. Accompanied by Gilbert Mendez and Richard Wayne Collins, who both followed him in another vehicle, appellant drove the ice cream truck away from the theater. Late that evening the abandoned ice cream truck was found by police. The next day, the body of Mohammed Ali Vahdat was discovered in a wooded area outside the Houston city limits. The cause of death was a gunshot wound to the head. No weapon or bullets were found at the scene. Expert testimony indicated that the fatal bullet could have ranged from .25 to .38 caliber.
>
> News of the death appeared in the newspapers. After reading the news an acquaintance of appellant, Christina Rosas, asked appellant about it. She testified that appellant admitted the killing, laughed about it and stated: "You're going to see me on Channel 11 and Channel 13. John Henry Quinones."

A.

Petitioner was arrested for the crime after he admitted killing Vahdat in a conversation with Richard Wayne Collins on June 22, 1978. Collins had been arrested five days earlier on unrelated charges and had agreed to wear a tape recorder during this conversation.[2/] The conversation was accordingly tape recorded by the Houston Police.

On July 20, 1978, the trial court held a hearing regarding petitioner's pre-trial motions. Pursuant to petitioner's Motion for Discovery and Inspection, petitioner requested that he be allowed to inspect any of his mechanically recorded

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2/ Portions of this tape recording were played at the guilty trial, and the entire tape was played at the penalty trial. The pertinent parts of the recording are set forth in extenso in the opinion of the Court of Criminal Appeals, and are found in Appendix A infra, at pp. A-4 through A-7.

statements in the State's possession. The State responded to petitioner's request by stating "there are none". The trial court ruled that "that would not be discoverable, by understanding the provisions of Article 39.14, I do not believe a mechanically recorded statement is discoverable under 39.14. You say you have none anyway. How do you want me to state that; denied." Record Vol. 2, pp. 5-7.

On September of 1978, petitioner filed a motion requesting production of tape recording. Petitioner alleged at that time that his attorneys found out about the tape recording existence from his co-defendant's attorney, Sam Adamo. Petitioner asserted in his motion that Mr. Adamo told them of the tape recording the Wednesday before the commencement of the trial. The Court ruled that the Motion for Production of the Tape Recording was untimely made. The portion of the tape recording conversation pertaining to the complainant's murder was admitted into evidence during the guilt-innocent stage of the proceedings (Vol. 9, pp 1904-1910) and the entire conversation was admitted into evidence during the punishment stage of the proceedings. Vol. 9, pp 2004-2007 and pp 2065-2069. On September 25, 1978, during the first day of petitioner's trial, Detective Susan Nixon testified concerning the tape recorded conversation between Richard Wayne Collins and Petitioner. Prior to the commencement of trial on September 26, 1978, petitioner requested a postponement of the proceedings and the employment of an independent expert to examine the tape recording in the State's possession. Petitioner asserted that he was surprised by the existence of the tape. Further, Petitioner pointed out that he had relied on the representations made by the Assistant District Attorney, Jack Boderford, wherein he stated on July 20, 1978, that there were no mechanically recorded statements

in the State's possession. Throughout the proceedings, the trial court ruled that the tape recording was not discoverable pursuant to the V.A.C.C.P., Article 39.14, the Texas Discovery Statute.

II. The Penalty Trial

Immediately following petitioner's conviction, a penalty trial was conducted before the same jury pursuant to Texas Code of Criminal Procedure, Article 37.071. [3/]

At the outset, the State introduced petitioner's prior criminal record. On June 25, 1976, petitioner pleaded guilty in Harris County (Houston), Texas, to the misdemeanor of unlawfully carrying a handgun, and was sentenced to 30 days in jail. R. 2351-52. [4/] On September 7, 1976, he pleaded guilty in Harris County to burglary of a building with intent to commit theft, and was sentenced to five years probation. R. 2340. On March 4, 1977, petitioner's probation was revoked for committing the offense of criminal mischief, and he was sentenced to 2-3 years confinement in the custody of the Texas Department of Corrections. R. 2342-43.

Jose Rodriquez, a Texas State Parole Officer, testified that petitioner was paroled in January of 1978. S/F 1959, 1961. [5/]

3/ In this proceeding, the State has the burden of proving beyond a reasonable doubt that the answer to each of the following questions is "yes":

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectaton that the death of the deceased or another would result;
(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

A "yes" answer to all three questions results in a mandatory sentence of death.

4/ Numbers preceded by "R." refer to pages of the record of petitioner's appeal to the Texas Court of Criminal Appeals.

5/ Numbers preceded by "S/F" refer to pages of the Statement of Facts of petitioner's appeal to the Texas Court of Criminal Appeals.

When released from prison, he did not have any place to live, because he lacked "an immediate family that really cared enough," S/F 1978. He stayed at a variety of addresses, "jumping back and forth from house to house, friend to friend, " S/F 1969. At one point, he slept in a car. S/F 1979-80. He had "no job, no money and no place of residence." S/F 1969.

Petitioner began missing appointments to report to the parole officer. S/F 1963. He had been "messing with drugs" prior to going to prison, although he did not have a major drug problem. He was supposed to participate in a drug rehabilitation program as a condition of parole. S/F 1962, 1976. However, he did not attend the outpatient program, and absconded after two days in an inpatient program. S/F 1966-68.

In May of 1978 petitioner was placed in a halfway house, but left after 10 days. S/F 1969. Parole Officer Rodriguez lost contact with him for several days, ibid, then found him "sleeping in some old car" as his residence, and thereafter "completely lost track of him." S/F 1970. Rodriguez last tried to find him on June 12th, three days before the present offense, but was unable to make contact. S/F 1970-83. At this point, the parole officer gave up hope of trying to help petitioner, and would have reported him as a parole violator had he not been arrested in this case. S/F 1983.

Rodriguez stated that he liked petitioner as a person, but that petitioner "was very immature" and "never seemed to really care whether he could make it out in the free world or not." S/F 1980. The parole officer did not report petitioner as a violator because of "his immaturity and his being young," and instead "was trying to help him." S/F 1981-82. "I felt that I could [help him] and obviously I was not able to." S/F 1982.

Rodriguez testified that petitioner always seemed to have pocket money despite his lack of jobs, a fact that made Rodriguez

suspicious. He stated that petitioner's reputation for being a peaceful and law-abiding citizen was "poor to bad", S/F 1973, and that "there is a good possibility that he would be a possible threat to free society, " S/F 1985.

John Brevelle testified that he observed petitioner and and another man robbing at gunpoint an adult bookstore in Harris County between 1:00 and 3:00 a.m. on June 13, 1978. S/F 1987-92. The defense introduced Houston police reports establishing that petitioner was not charged with this offense because the two complainants, who were closer to the perpetrator during the offense than Brevelle, were unable to identify petitioner. R. 2364, 2367, 2368. Defense counsel's objection to Brevelle's testifying to this extraneous unadjudicated offense was overruled. S/F 1988.

After playing the tape recording of the conversation between petitioner and Richard Wayne Collins, see p. 6 and foot note 2, supra, the State called Dr. Jerome Brown. Dr. Brown, a clincial psychologist, S/F 2020, had interviewed petitioner on August 21, 1978, to evaluate his competency to stand trial and his sanity at the time of the offense, S/F 2022. The interview lasted one and a half to two hours. S/F 2027-28.

Dr. Brown testified that Johnny Quinones was raised by his paternal grandparents afer the age of six months. S/F 2023. He was considered illegitimate by his natural father, who never accepted him or cared for him, S/F 2024, 2040, and who left him feeling abandoned and rejected, S/F 2040. Johnny nonetheless had a "reasonably satisfactory" home life with his paternal grandparents until age 8, when his grandfather died. S/F 2023. The grandfather had assumed "the major parental role" until then, and his death was "a significant blow" to petitioner: "he lost the most significant and positive figure in his life at that point." S/F 2041.

After his grandfather's death, Johnny Quinones began "messing up", S/F 2023, engaging in drug abuse, glue sniffing and marijuana smoking, S/F 2023-24. He was sent to a mental health center in Houston, but left because he feared that his father was trying to get him committed to a mental hospital. S/F 2024-25, 2043-44. He was arrested approximately 25 times for various offense such as loitering, petty theft, possession of marijuana and glue sniffing; at age 11, he was sent to the Harris County Youth Village for nine and one-half months by a Juvenile Court Judge, S/F 2024. By the ninth grade he had been "kicked out of the house by his father" and was "living in the streets." S/F 2026. He was using drugs extensively, although his pattern of drug abuse was "sensation seeking" rather than addictive. S/F 2025-26.

Dr. Brown diagnosed petitioner as having an "antisocial personality disorder." S/F 2030.[6/] He declined to predict that petitioner would probably commit future acts of criminal violence that would be a continuing threat to society, stating that "I cannot professionally predict that kind of behavior in that way." S/F 2062. He did testify, however, that petitioner "possesses a much greater likelihood than the average person" of committing such acts. S/F 2032-2059.

Dr. Brown testified that antisocial personality disorders are less prevalent in people aged 40-50, and that by ages 50-60 antisocial personality characteristics seem to diminish or drop out of personality functioning altogether. S/F 2052.

6/ Defense counsel objected to Dr. Brown's testimony as to his diagnosis, on the ground that "no legal warnings of any type were given to the defendant in regard to whether or not any testimony or anything that he would say to the doctor would be used against him in regard to question number two as a probability." S/F 2030. The objection was overruled, ibid., and the claim was not renewed on petitioner's appeal to the Texas Court of Criminal Appeals.

He felt that there is no known cure for sociopaths, and a low probability of rehabilitation. S/F 2053, 2058. But he agreed that "time itself takes away some of these characteristics as a person gets older." S/F 2053.

The defense presented the testimony of two of petitioner's relatives, Ascension and Mario Quinones.

Ascension Quinones described his relationship to Johnny Quinones as follows: "His mother had him while she was still legally married to me but we were separated for over a year." S/F 2121. The boy's mother, "left him with other people," after which he was first in the custody of a brother of Ascension Quinones and later in the custody of the mother and father of Ascension Quinones. Mr. Quinones admitted that he never treated Johnny Quinones as a son and never gave him any fatherly advice. Ibid. He denied ever having the boy live Ibid. He stated that his contact with Johnny for all of the past 18-19 years had been "[n]one whatsover" other than to give money for support. S/F 2122.

Mario Quinones testified that he was a brother of Ascension Quinones and was Johnny's uncle. S/F 2118. "My relationship, as far as I'm concerned, is that I'm his uncle, although my brother never did recognize him as his son." S/F 2120.

Mario Quinones stated that the boy's mother abandoned him when he was one momth old, after which Mario Quinones picked him up and brought him home to live with Mario Quiniones and his wife. They wanted to adopt the boy, but Ascension Quinones refused to cooperate. S/F 2118. When the boy as about 9 or 10 months old, custody was taken by the parents of Ascension and Mario Quinones. S/F 2119.

Johnny Quinones lived with his grandparents until age 8, when his grandfather died. Shortly thereafter the boy's mother

reappeared, and he became attached to her: "The only time I ever saw him really happy was when his mother was around . . . . [H]e had somebody that he could really say was his own, that was is mother, " S/F 2119-20. However, after two or three months his mother died. Ibid.

By this time, the boy's grandmother was an invalid who could not walk. Ascension Quinones was remarried and, apart from a brief stay with another uncle, Johnny Quinones had no guidance whatsoever. S/F 2120. He "was just stickly on his own." S/F 2119. "He started roaming and he didn't have any place to go." S/F 2120.

The defense also called Dr. Fred L. Fason, a psychiatrist. S/F 2070. He had examined petitioner for an hour on September 25, 1978, S/F 2071-72, and had examined petitioner's psychiatric records from St. Joseph's Hospital (1970-72) and Center Pavillion Hospital (1974), S/F 2074.

Dr. Fason testified that petitioner was in many ways a "typical sociopathic personality," S/F 2077, but that "[t]here are certain characteristics in which Mr. Quinones differs from the typical sociopathic personality," S/F 2076. For example, the 1970 St. Joseph's Hospital records show that at age 11, Johnny Quinones displayed the following characteristics:

> "It is extremely obvious from the patient's psychological tests and from past history that he feels tremendously rejected. He is reaching out for the love of his father but this love is never given. Johnny feels hostile towards his father and acting out behaviour that should be termed as hositility towards his father. At an unconscious level, he has homicidal feelings toward his father. His family situation is constantly in turmoil and Johnny is waiting for the roof to cave in and his world collapse. His grandfather's death intensified feelings of rejection and he is worried his grandmother might die and leave him all alone."

S/F 2078-2079. Dr. Fason stated that this "is not typical of the sociopathic personality. The sociopathic personality does not reach out for love. They are much more self-contained." S/F 2079.

Turning to the 1974 records of Center Pavillion Hospital, Dr. Fason described test results in which petitioner displayed many characterisitics that are not typical of sociopaths. For example, petitioner ranked moderate in self-blame, shame, and remorse for past behavior. S/F 2079. In hostility he ranked only one on a scale of six. Ibid. In manipulativeness he ranked zero on a scale of six. S/F 2080. In projection of blame onto others he also ranked zero. S/F 2081. In passive dependency, submissiveness, compliance, and seeking of support and reassurrance, he ranked three out of six, whereas sociopaths usually score zero. S/F 2081.

Dr. Fason testified that petitioner's grandfather was "someone he cared about and who cared about him, whom he really respected and looked up to and admired. Someone he wanted to be like when he grew up." S/F 2085. When his grandfather died, the boy "didn't wish to be hurt like this again so therefore he was going to relate to other people that way." Ibid. The St. Joseph's Hospital records reveal that he did "reach out towards his father as a substitute as someone to take his grandfather's place and he was rejected at that point." Ibid.

Dr. Fason described his conclusions as follows:

> The overwhelming mass of evidence points to the fact that Mr. Quinones differs somewhat in [sic] the typical sociopath in that he does have the ability to reach out to love and to relate to others prior to the death of his grandfather. Subsequent to the death of his grandfather he regressed to the earlier level of adaptation of narcissistic position and remained for most of the time since then pretty much in the basic position. If he continues to remain in that position, I would expect

> his behavior would be characteristic of the typical sociopath in the future. However, there is the possibility and there is evidence from files or at least there is the possibility that he may not. He has a much better prognosis in terms of his ability to develop some relationship with other people that he can depend upon than some sociopaths. S/F 2088-89.

Dr. Fason agreed with the prosecutor that if petitoiner's personality did not change for the better, the doctor had no reason to believe that petitioner would not continue to commit criminal acts of violence. S/F 2103, 2104, 2108. However, he also agreed with defense counsel that the prognosis would be different if petitioner were to "come under the influence of a stabilizing individual" or to be "institutionalized for twenty or thirty years and during that period of time... be able to achieve some success on his own within that institution itself." S/F 2107-08.

Dr. Brown, recalled by the defense, testified that petitioner

> did exhibit some insight into the causes of possible causes of some of his difficulties in life and he also seemed to be willing to acknowledge personal responsibility for some of his criminal activities in the past. Those two things are not typically found in people with severe antisocial personality disorders. S/F 2113.

He also agreed that the influence of a stablilizing individual or 20 to 30 to 40 years of self-achievement during imprisonment would change his prognosis. S/F 2113-14.

At the conclusion of the penalty trial, defense counsel requested the trial court to instruct the jury as follows in its charge: "Evidence presented in mitigation of the penalty may be considered should the jury desire, in determining the answer to any of the special issues." R. 126, 127. The request was denied. Ibid.

After the charge was delivered, S/F 2123, R. 128-29, counsel presented closing summations. The prosecutor's summation included the following statements:

> Everything Mr. Collins [defense counsel] asked ... [Dr. Fason] was based on the proposition of if there were a dramatic change. That answers the question. This doesn't say will, twenty-five or thirty years from now, something dramatic happen to change John Henry Quinones. It says: Do you find he will commit those acts. that there is a probability beyond a reasonable doubt he will commit those acts. Not the twenty-five or thirty years from now. Everybody ageees as he is here today, he will. I suggest that evidence commands a unanimous vote of yes. That alone. S/F 2160.
>
> Everyone has agreed there is no rehabilitation for this man. Mr. Collins wants you to guess that maybe it would happen. It doesn't matter whether it would or not anyway because the evidence shows that the answer is yes as to whether he would commit the future acts of violence.... S/F 2163.

The jury, after deliberating two hours and twenty-four minutes, returned "yes" answers to the special questions--under Texas law and the trial court's charge, a verdict of death. R. 148. S/F 2178-79.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. On appeal to the Texas Court of Criminal Appeals, Petitioner argued that the trial court's refusal to instruct the jury that evidence in mitigation may be considered at the penalty phase of a capital case violated his rights under the Eighth and Fourteenth Amendments. The Court of Criminal Appeals rejected this claim, stating that, "the jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence. No additional charge is required." A.

2. On appeal to the Texas Court of Criminal Appeals, Petitioner argued that the state's use of an alleged unadjudicated offense at the penalty phase of evidence deprived petitioner of due process and equal protection of the law, and violated his Sixth and Fourteenth Amendment right to effective confrontation and cross examination of the witnesses against him. The Court of Criminal Appeals rejected this claim, holding that, "evidence of unadjudicated extraneous offenses can be admitted in the punishment phase of a capital murder trial. Garcia v. State, 581 S.W.2d 168 (Tex.Crim.App. 1979)." A

3. On appeal to the Texas Court of Criminal Appeals, Petitioner argued that the trial Court erred in ruling that mechanically tape recorded statements were not discoverable pursuant to V.A.C.C.P., Art. 39.14, in that the tape recordings were not properly authenticated, that Appellant's request for postponement of the proceedings of the trial after the initial testimony concerning tape recordings was erroneously denied and that he was denied a fair and impartial trial by the prosecutor's suppression of the tape recordings and the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution because his attorneys relied upon the District Attorney's representations. The Court of Criminal Appeals rejected Petitioner's allegations holding that

(1) "Appellant does not have a general right to discovery of evidence in the possession of the state, even if the evidence is Appellant's own statements". See Cicenia v. Legay, 357 U.S. 504, 78 Sup.Ct. 1297, 2 L.Ed.2d 1523 (1958); (2) Based upon the United States v. Agurs, 427 U.S. 97, 96 Sup.Ct. 2392, 49 L.2d 342 (1976), tests for materiality in regard to denial of access to exclupatory evidence, the Court of Criminal Appeals found that Petitioner was not denied effective assistance of counsel; (3) Petitioner was not denied a fair trial by the prosecutor's intentional misrepresentations at the discovery hearing; and (4) Texas requires the trial court to permit the discovery only if the evidence sought is material to the defense of the accused as per Agurs.

REASONS FOR GRANTING THE WRIT

I.

BY SANCTIONING THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT MITIGATING EVIDENCE MAY BE CONSIDERED UPON THE SPECIAL ISSUES WHICH DETERMINE A DEATH SENTENCE UNDER TEXAS LAW, THE COURT OF CRIMINAL APPEALS EVISCERATED THE VERY BASIS ON WHICH THIS COURT UPHELD THAT LAW IN JUREK V. TEXAS, 428 U.S. 262 (1976), AND THEREBY VIOLATED PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Like Gardner v. Florida, 430 U.S. 349 (1977), and Godfrey v. Georgia, 48 U.S.LW 4541 (U.S., May 19, 1980), this case presents the question whether a death penalty statute sustained by the Court in 1976 may constitutionally be applied in a manner that betrays the very premises upon which the Court upheld it. In Jurek v. Texas, 428 U.S. 262,272 (1976)(plurality opinion), this Court expressly stated that, "the constitutionality of the Texas procedures turns on whether the enumerated (statutory) questions (which determine the penalty of death) allow consideration of particularized mitigating factors." Finding that the statutory questions, as construed by the Texas Court of Criminal Appeals, did "allow consideration of particularized mitigating factors", the Court approved the statute. Thus, in the present case, petitioner requested the trial judge to instruct the jury that mitigating factors might be considered in answering the statutory questions. The trial judge refused, and the jury was not so instructed. Nevertheless, the Texas Court of Criminal Appeals affirmed petitioner's death sentence.

No more obvious disregard of Jurek could be imagined. In Lockett v. Ohio, 438 U.S. 586, 606-607 (1978)(Plurality opinion), this Court once again made plain that Jurek had upheld the Texas death-sentencing statute solely because of the broad construction then believed to have been placed upon it by the Texas Court of Criminal Appeals:

> Jurek involved a Texas statute which made no explicit reference to mitigating factors. 428 U.S. at 272. Rather, the jury was required to answer three questions in the sentencing process, the

> second of which was "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex.Code.Crim.Pro., Art. 37.071(b)(Supp. 1975-1976); see 428 U.S. at 269. The statute survived the petitioner's Eighth and Fourteenth Amendment attack because three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question - despite its factual narrowness - so as to permit the sentencer to consider "whatever mitigating circumstances" the defendant might be able to show.. Id., at 272-273 (opinion of Stewart, Powell, and Stevens, JJ.), citing and quoting, Jurek v. State, 522 S.W.2d 934, 939-40 (Tex.Crim.App. 1975). See also Adams v. Texas, 48 LW 4869,4871 (6-24-80).

However, here the Court of Criminal Appeals has effectively nullified that broad construction, by sanctioning the trial court's denial of a simple defense request to tell the jury about it. Thus, petitioner's jury was sent out to decide his fate solely on the basis of the "facial narrowness" of the statute -- not upon consideration of the broad construction which had been accepted by this Court as the exclusive basis for the statute's constitutional survival. Petitioner's resulting death sentence cannot conceivably be squared with the Eighth and Fourteenth Amendments.

In Lockett v. Ohio, supra, 438 U.S. at 604, the Court explicitly spelled out the duty of the States to permit consideration of mitigating evidence at capital sentencing trials:

> We conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Id. at 604 (plurality opinion) (emphasis in original) (footnotes ommitted).

The Court held that the failure to accord "independent mitigating weight" (id.at 605) to all "independently mitigating factor(s)", (id. at 607)

> creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between

> life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments. Id. at 605.

The Court had earlier held in Woodson v. North Carolina, 428 U.S. 280, 304 (1976)(plurality opinion), that capital sentencing schemes may not preclude the sentencer from considering "compassionate or mitigating factors stemming from the diverse frailties of humankind." This constitutional command was underscored once again in Lockett:

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important that in noncapital cases. 438 U.S. at 605.

Here petitioner presented the very sort of mitigating evidence envisioned in Woodson and Lockett. Johnny Quinones, only 19 years old at the time of the offense, had been abandoned by his mother one month after birth. His father refused to accept the boy, insisting that he was illegitimate, and petitioner was raised by his grandparents. At age 8 his grandfather died, depriving petitioner of the only authority figure in his life. His natural mother appeared shortly thereafter and a relationship of love and trust with her began to develop, only to be quickly terminated by her untimely death.

Although petitioner's condition deteriorated rapidly after his mother's death, the present offense represents his only conviction for a crime of violence. A phychiatrist called by his attorney at the penalty trial depicted him as a troubled boy reaching out for love, who with proper guidance and the passage of time might yet be rehabilitated. The state's psychologist did not disagree with that diagnosis.

To be sure, both professionals agreed that petitioner does present a danger to society in his present condition. This was the narrow point, based upon a narrow and literal contruction of

the Texas statute, that the prosecutor hammered home in summation:

> Everyone has agreed there is no rehabilitation for this man. Mr. Collins (defense counsel) wants you to guess that maybe it would happen. It doesn't matter whether the evidence shows that the answer is yes as to whether he would commit the future acts of violence... S/F 2163.

Nevertheless, petitioner had presented evidence in mitigation: his youth, his history of abandonment and misfortune as a child, his reaching out for love relationships that were denied him, his potential for rehabilitation after many years in prison. Consistently with Lockett, the jury could not be precluded from according "independent mitigating weight" (438 U.S. at 605) to those "independently mitigating factor(s)" (Id. at 607).

Accordingly, defense counsel asked for a simple jury instruction at the penalty phase:

> Evidence presented in mitigation of the penalty may be considered should the jury desire, in determining the answer to any of the special issues. (R.p.126,127).

The instruction was denied,7/ and the Texas Court of Criminal Appeals found no error in denying it because "the jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence." A. This holding is untenable for at least three reasons. First, the "facial narrowness" of the statute recognized by this Court in Lockett, 438 U.S. at 606, and mirrored in the trial judge's sentencing charge below completely belies the facile assumption that juries will intuitively grasp -- without being told -- the broadening construction adopted in Jurek. Second, "in death cases doubts (regarding the adequacy of jury

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7/ The charge actually delivered at the penalty phase (R.128-129), annexed as Appendix B, does little more than track the language of the Texas death-sentence statute.

instructions to inform the jurors properly about their sentencing function)...should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948). Third, under Lockett, Johnny Quinones had a right to independent consideration of mitigating factors such as youth and a history of childhood misfortune, even if the evidence also established probable future dangerousness.

By affirming the trial court's refusal to instruct the jury in conformity with the sentencing guidelines required by Jurek and Lockett, the Court of Criminal Appeals has reinterpreted and applied Tex.Code.Crim.Pro., Art. 37.071 in a manner which wholly undermines the only basis upon which this Court upheld the statute. Certiorari should be granted to determine whether, in this new interpretation and application, the statute can survive scrutiny under the Eighth and Fourteenth Amendments.

II.

V.A.C.C.P., ART. 37.071 IS UNCONSTITUTIONAL IN ITS APPLICATION IN THAT INHERENTLY UNRELIABLE EVIDENCE IS ALLOWED TO BE INTRODUCED AT THE PUNISHMENT PHASE OF A CAPITAL MURDER PROCEEDING TO SUPORT A DEATH SENTENCE WITHOUT NOTICE TO THE DEFENDANT OR HIS ATTORNEYS OF THE STATE'S INTENTION TO PRESENT EXTRANEOUS OFFENSE TESTIMONY AND THEREBY, VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In upholding the Texas death penalty procedure, this Court, in Jurek v. Texas, 428 U.S. 262, 276,(plurality opinion), upheld the constitutionality of the Texas death penalty procedure partially based upon the "prompt judicial review of the jury's decision in a court with state wide jurisdiction. Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly', imposed it does not violate the Constitution." With this statement in mind, the Texas Court of Criminal Appeals has interpreted V.A.C.C.P., Art. 37.071 to mean

that unadjudicated criminal offenses and blatant hearsay testimony may be introduced into evidence at the punishment phase of capital murder trials. See Garcia v. State, 581 S.W.2d 168 (Tex.Crim.App. 1979); McManus v. State, 591 S.W.2d 505 (Tex.Crim.App. 1979). However, the Texas Court of Criminal Appeals has failed to reconcile longstanding principles in Texas jurisprudence whereby unadjudicated extraneous criminal offenses may not be considered at the punishment phase of criminal trials pursuant to the requirements of V.A.C.C.P., Art. 37.07(3), nor may unadjudicated offenses be introduced at the guilt phase of a criminal trial unless there is a clear showing by the state of the materiality to an issue in contest in the criminal proceedings. See Albrecht v. State, 486 S.W.2d 97 (Tex.Crim.App. 1972). In upholding the admission of extraneous unadjudicated criminal offenses, the Texas Court of Criminal Appeals has held that such evidence is admissible for the jury's consideration as being relevant to the special issues which are required by statute. Texas ignores the fact that unadjudicated criminal offenses are by their very nature inherently unreliable and prejudicial and should not be allowed to support a death sentence. Petitioner maintains that the use of such unreliable evidence in support of a death sentence violates the Eight Amendment prohabition against the imposition of cruel and unusual punishment.

In all criminal proceedings in Texas, a defendant can expect certain evidence to be introduced at the punishment phase of a trial. V.A.C.C.P., Art. 37.07 is specific that unadjudicated offenses may not be considered by either the court or a jury in accessing punishment. Further, if a defendant is charged by indictment as an habitual criminal in Texas pursuant to Tex.Pen.Code, Art. 12.42(d), notice and proof are required before a person can be assessed a life sentence. In Parasco v. State, 309 S.W.2d 405 (Tex.Crim.App. 1958), the Texas Court of Criminal

Appeals specifically stated that an accused is entitled to proper notice in the indictment of any prior conviction which the state seeks to use in connection with a primary offense whether it be an element of the offense or for enhancement purposes. The Texas Court of Criminal Appeals has maintained no such guidelines in capital murder proceedings.

In capital murder trials, no specific notice is required before an unadjudicated offense may be introduced into evidence. The state is not required to plead the specifics of the allegations. The lack of notice before introducing the controversial evidence deprives the defendant of the opportunity to prepare cross examination and investigate such allegations.

In the case at bar, the state introduced an extraneous robbery offense through the testimony of John Braeville, who testified that on June 13, 1978 he was working in an adult bookstore in Houston, Texas, when he was robbed by petitioner carrying a gun similar to the state's Exhibit No. 34. (R.V.IX.,p.1991). On cross examination, the witness stated that he had previously viewed a picture showup which included petitioner and had identified petitioner in a counselous lineup during the month of July, 1978. It appeared from the state's offense report that two other persons were present when the store was robbed but could not identify petitioner. (R.V.IX.,p.1995). Other extraneous evidence testimony was included in the tape recording presented to the jury during punishment. In Presnell v. Georgia, 439 U.S. 14 (1979), the Supreme Court clearly held that a conviction for capital murder must be based upon the specific offenses charged and not for any additional offenses. In reversing the Georgia Supreme Court's decision, this Court noted that in Cole v. Arkansas, 333 U.S. 196, 1948, Justice Black stated that,

> It is as much a violation of due process to send the accused to prison following conviction of a charge in which he was never tried as it would be to convict him upon a charge that was never made.

In Presnell, this Court noted that "these fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital phase than they do in a guilty determination of any criminal trial." c.f. Gardner v. Florida, 430 U.S. 349 (1977). In Presnell, the court's charge authorized a death sentence if the jury found that Presnell had committed the offense of murder while committing the offense of aggravated sodomy. At no time had petitioner been charged with the offense of aggravated sodomy. Thereby, in order to defend the state's charge, a defendant must be prepared to try not only the primary allegation of capital murder, but also any and all other offenses that might possibly exist. Normally, a capital murder jury is allowed to hear the state's allegations of other misconduct by the accused without presentation of evidence contradicting the same. Fundamental fairness requires that an accused be given notice of the charges against him for which he will be tried.

It should be noted that several other jurisdictions do not permit extraneous offenses at the punishment phase of capital murder trials. In State v. Goodman, 257S.E.2d 569, the North Carolina Supreme Court recognized that their death penalty procedure "excludes the possibility of considering mere arrests or accusations as factors on aggravation". See also Provence v. State, 337 S.E.2d 783 (Florida, 1979)(Cert.denied); State v. Rust, 197 Nebraska 528, 250 N.W.2d 67 (1977). In Cozzolino v. Tennessee, 584 S.W.2d 765 (1979), the Supreme Court of Tennessee recognized that mere evidence of subsequent crimes which did not result in convictions, were not admissible to establish any of the aggravating circumstances set forth in T.C.A., Sec. 39-2401, for it is relevant to none of them.

Thereby, petitioner maintains that the Texas death penalty procedure as upheld by the Texas Court of Criminal Appeals, allows for a death sentence based upon charges not made by

indictment and supported by inherently unreliable evidence. Consequently, petitioner maintains that the admission of extraneous criminal offenses at the punishment phase of a capital murder trial violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and violates the clear constitutional mandate of this Court in Jurek.

For these reasons, a writ of certiorari should be granted to review the decision of the Texas Court of Criminal Appeals.

PART III.

Petitioner maintains that he was denied a fair and impartial trial by the intentional misrepresentation by the prosecuting attorney as to the existence of the tape recorded conversation between petitioner and his co-defendant, Richard Wayne Collins, and by the trial court's refusal to order discovery of the tapes and the trial court's sanction of the prosecutor's action. Petitioner further maintains that he was denied the effective assistance of counsel because his trial attorney relied on the prosecutor's statements. Thereby petitioner's attorneys could not effectively advise him of the consequences of not-guilty or the alternatives available to him to plead guilty.

In reviewing the foregoing allegations, the Texas Court of Criminal Appeals held that a defendant is not entitled to discover his own statements [8] and even if the statements were discoverable, they were not material to his defense within the meaning of United States vs Agurs, 427 U.S. 97 (1976). Consequently, the Texas Court of Criminal Appeals applied a due process standard for determining reversible error where a prosecutor failed to disclose exculpatory evidence to defense. Texas' reliance on such a test clearly is misplaced, given the actions of the prosecutor and the material sought to be discovered. A prosecutor has an affirmative duty to disclose to defense counsel any written or recorded statements and the substance of any oral statements made by the accused, in his possession. See ABA Standards Relating to Discovery Procedure Before Trial, §2.1(a)(ii). This Court cannot sanction clear prosecutorial misconduct by this process in support of a death sentence. As noted by Judge Odom, in his dissenting

opinion, this conviction should be reversed for prosecutorial misconduct. The Federal rule is that a conviction will not be reversed unless the accused was prejudiced by the prosecutor's nondisclosure. The fact of the jury's verdict and petitioner's death sentence should be all the prejudice required to summarily reverse petitioner's conviction and remand the same for a new trial. United States vs Brown, 554, F2d 1274 (5th Cir. 1978); United States vs Boquious, 564 F2d 1193 (5th Cir. 1977).

Petitioner further maintains that the true effect of the prosecutor's misconduct can best be measured in terms of the attorneys' advice to him in regards to his plea of not guilty. Petitioner's trial attorneys both testified that had they known of the tape recordings' existence and had heard the tape recording prior to the trial, they would have recommended that petitioner plead guilty to murder and accept the State's recommendation of life. Because they relied on the prosecutor's statements, defendant's attorneys could not effectively advise petitioner as to the possible outcome of the trial and the desireability of plea negotiations. Consequently, petitioner was not capable of making an informed and conscious choice of the options available. Tollett vs Henderson, 411 U.S. 258 (1973). Consequently, petitioner's attorneys were prohibited from providing to him a realistic assessment of the probability of conviction and the likelihood of death as punishment. As note in Tollett vs Hendrson, 411 U.S. 267-68, the

> "principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to mass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interests of his client, and such representation

> frequenlty involves highly practical consideration as well as specialized knowledge of the law. . . a prospect of plea bargaining, the exertation or the hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea."

In the case at bar, because of the prosecutor's misrepresentations, petitioner's trial attorneys were prohibited from effectively carrying out the Tollet role.

No form of diligence could have prepared petitioner's attorneys for the devestating impact on the guilt phase of the trial once the tape recordings were submitted into evidence. Petitioners trial attorneys frustration can best be evidenced by the closing argument by defense at the guilt phase of the trial wherein Mr. Collins (one of petitioner's trial attorneys) stated: "In light of the misrepresentations made by Mr. Boderford, the prosecutor, that there were no tapes in existence and the manner of his conduct in the trial itself, we waive our right to argue." Vol. 9 p. 1922. The record is abundantly clear that the evidence was overwhelming once the tape recording was played to the jury. The tape recordings' impact on the jury at punishment is equally obvious. The tape contained plans to commit future crimes, along with statements concerning the killing and petitioner's alleged feelings toward other people. The jury could consider the tape recordings as they deliberated on the Texas special issues.

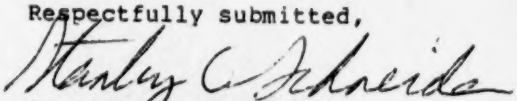
Certiorari should be granted to determine whether defendant's own statements are discoverable and whether a conviction will be sustained which results from evidence that was intentionally and knowingly suppressed by the

prosecutor. The record is abundantly clear that petitioner did not have a fair trial as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and that his attorneys could not adequately advise him of the possible consequences of his plea of not guilty because of the attorneys' reliance on the prosecutors' statements.

CONCLUSION

Petitioner prays that petitioner's Writ of Certiorari be granted. Alternatively, petitioner prays that his conviction for capital murder be summarily reversed and remanded for new trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing has been furnished to ANITA ASHTON, Assistant Attorney General, Post Office Box 12548, Capitol Station, Austin, Texas, 78711, by certified mail, return receipt requested, this_____day of July, 1980.

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JOHN HENRY QUINONES, Appellant

NO. 62,117 v. -- Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

O P I N I O N

This is an appeal from a conviction for capital murder. The punishment is death.

Appellant raises various grounds of error stemming from the use of a tape recording of a conversation between appellant and an accomplice. Appellant also claims that the indictment is duplicitous, that the court erred in refusing to order discovery or independent examination of a pistol, that the charge to the jury on guilt failed to define the offense, that evidence of an extraneous offense was improperly admitted in the punishment phase, and that the charge to the jury on punishment was insufficient.

The evidence, which is sufficient to support the conviction, will be summarized so the matters discussed may be more clearly understood. On the afternoon of June 15, 1978, appellant and Robert Leal visited Simonia Sendejo at her home. Both Leal and Sendejo noticed that appellant was carrying a pistol. Appellant left the Sendejo house but soon returned in a neighborhood ice cream truck. The truck, which the appellant had hijacked, was being driven by Mohammed Ali Vahdat.

Appellant waved Leal and Sendejo over to the truck and told them to get in. Appellant forced Vahdat to begin driving to a Houston-area drive-in theater. During the drive, appellant pocketed the money in the truck, took Vahdat's money, watch and wallet, appropriated a tape player, and struck Vahdat with a gun. Appellant then told Leal to drive and forced Vahdat to the back of the truck. Appellant struck Vahdat repeatedly during the remainder of the trip to the theater.

At the theater, appellant told everyone that because he was on parole and did not want to return to jail he would have to kill Vahdat. Sendejo fled. Leal also abandoned the truck and saw it leave the theater. About thirty minutes later the appellant returned in the truck and informed Leal that he had sexually assaulted Vahdat. Other witnesses overheard Vahdat moaning and pleading for his life.

Appellant ignored attempts by the theater staff to dissuade him from killing Vahdat. Accompanied by Gilbert Mendez and Richard Wayne Collins, who both followed him in another vehicle, appellant drove the ice cream truck away from the theater. Late that evening the abandoned ice cream truck was found by police. The next day, the body of Mohammed Ali Vahdat was discovered in a wooded area outside the Houston city limits. The cause of death was a gunshot wound to the head. No weapon or bullets were found at the scene. Expert testimony indicated that the fatal bullet could have ranged from .25 to .38 in caliber.

News of the death appeared in the newspapers. After reading the news an acquaintance of appellant, Christina Rosas, asked appellant about it. She testified that appellant admitted the killing, laughed about it and stated: "You're going to see me on Channel 11 and Channel 13. John Henry Quinones."

On June 17, Richard Wayne Collins was apprehended on unrelated charges at a Houston motel. Collins gave the police a 7.65 mm. automatic pistol which he said did not belong to him. Other testimony identified this pistol as the one being carried by appellant on June 15, although the witness, Robert Leal, described the pistol as being a .32 caliber automatic pistol. During questioning, Collins began giving information about the Vahdat murder. On June 22, Collins agreed to wear a tape recorder

in an effort to secure a taped conversation between Collins and appellant about the crime. After receiving the tape of this conversation, the police arrested appellant for capital murder.

Appellant was indicted on July 12. On July 20, the trial court held a hearing on appellant's pretrial motions. Paragraph (b) of appellant's motion for pretrial discovery asked for discovery of "all recorded statements allegedly made by the Defendant, if any continuing . . . ." At the hearing the court, in reviewing the motion, engaged in the following colloquy:

> "THE COURT -- Paragraph b.): All recorded statements allegedly made by the Defendant.
>
> "Are you speaking about mechanically recorded statements?
>
> "MR. COLLINS [one of the defense attorneys]: Yes, your Honor.
>
> "THE COURT: Observations, Mr. Bodiford?
>
> "MR. BODIFORD [an Assistant District Attorney]: There are none.
>
> "THE COURT: That would not be discoverable, if I understand the provisions of Article 39.14. I do not believe a mechanically recorded statement is discoverable under Article 39.14.
>
> "You say you have none anyway. How do you want me to state that; denied?
>
> "MR. BODIFORD: The State asks it be denied."

The discovery request was denied. Although appellant himself was aware of the existence of the tape from the time of his arrest, his attorneys first learned of the tape from Collins' attorney on September 13.

On September 18, the first day of trial, appellant attempted to move for production of the tape recording. The trial judge refused to hear the motion since he held that it was untimely filed. On September 25 the State introduced testimony about how

the tape recording was obtained and made. The next day, appellant filed a motion for continuance, requesting additional time to examine the tape, and a motion for court appointment of an independent expert to examine the tape. Both of these motions were denied.

Portions of the tape were played before the jury during the guilt phase of the trial and the entire tape was played during the punishment phase. The tape contained a fifteen second tapeover which, according to the State's witnesses, was caused by an officer accidentally pressing the "record" button on the machine. The recorded conversation, in pertinent part and including the tapeover, was as follows:

"QUINONES: Went, mmm boy, I tell you I gonna call that chick out that day.

BREAK IN TAPE, TAPEOVER IN NARCOTICS DIV., LT. THOMAS'S OFFICE

"SCHULTEA[a police officer]: Four, testing, one -- go to ID man, and they act like you committed a crime -- pick up right there.

"COLLINS: Let's go ahead and listen to it, he's just fixing to get to the part where ---

"NIXON[a police officer]: Where we want to hear.

"SCHULTEA: Quit foolin with it --

END TAPEOVER, 15 SECOND DURATION

"COLLINS: Hey man, the cops, cops got that gun.

"QUINONES: I know that.

"COLLINS: They got it, I don't think they know where it come from though.

"QUINONES: Well hey, they reported it hot, the ones, the people who had it.

"COLLINS: They did . . . Where'd you get that motherfucker, Mexico or somethin?

"QUINONES: From here, that's what we used to, uh, hold-up the 13G's.

"COLLINS: What, the THC?

"QUINONES: There ain't no heat in that man, there ain't no heat in that man.

* * *

"COLLINS: What, like if -- if -- if the heat comes down, man, like, what a -- about bond man?

"QUINONES: Don't worry about no heat man, don't even worry about it no more. Just as long, Johnny Morales, I don't know if they told you about it, (indecipherable word) him in the night, man, they investigated it, but let me tell you, ain't nobody seen me, ain't nobody seen you, in that car, man, ain't anybody even knows you fuckin had nothing to do with it. Only person knows man, me -- you -- see the only ones who saw the actual murder man, just me, you and Gilbert. Gilbert ain't even been the drive-in no more. He's staying clear, man.

"COLLINS: Dig it.

"QUINONES: I ain't --

"COLLINS: He move, -- he moved didn't he?

"QUINONES: Yeah, I think so. I ain't been stealing nothing. I did a little stealing here and there, just some bullshit shit, you know what I mean, but, uh, I'll tell you about some shit, if you want to, man, you can go with us, man, but it will come out of my cut, or you can loan me your car in the mornin, man. We steal in the mornin, man, early. . . pick up my cousin, man, you know which one I'm talking about, man, that big one, with all them tattoos? Me and him goin to do, not no robbery, no going to be no heat on this car, man, all we just need is something to load up some shit on, like hot items.

"COLLINS: Yeah, well . . .

"QUINONES: All we going to do is steal some shingles.

* * *

"COLLINS: What's you do with that tape deck, man, think I might get that mother fucker man, and fucking put it in my ride, man.

"QUINONES: Can you hook it up right fast, man?

* * *

"COLLINS: That scared -- I don't you know -- that, when -- when you shot that dude, I don't believe I could have done that, man.

"QUINONES: Huh?

"COLLINS: I got a weak stomach.

"QUINONES: Well, shit man --

"COLLINS: I was too happy to at the time man, I mean I was high, man . . .

"QUINONES: Not did it because I was high, man, but I thought about it hard, man, I didn't want to kill that dude, man, I didn't want to kill him, you know what I mean? (Quinones yawning while talking, unintelligible words.)

"COLLINS: I read about this shit in the newspaper man.

"QUINONES: Yeah, they told me they got the clippings out. I'm going to read it whenever they find it, they put it up somewhere. Anyway, uh, did you, uh, -- I don't know, man, it's just -- it's just a matter between you going to the pen, man, for robbery, man, or you taking a chance of murdering him, man, and get busted.

* * *

"COLLINS: I tell you man, I'm going to quit, you know, like coming around for a while.

"QUINONES: All right, that's cool, brother, but like I said, the only reason I asked you down, cause I need a little money, see all we're going to do, like I said, is go and see what we can do, me and him, cause he knows the places, and he needs some help. I make maybe fifty, a hundred dollars, two hundred, within a day, man, cause we go early, and I give you half. See he's a junky, so he gets half, and I don't try to take none of his cash, man, cause he needs it, he -- he's sick man.

"COLLINS: Yeah.

"QUINONES: See, half of my cut, you know what I mean, will be anywhere from fifty to a hundred, you gotta -- you gotta play the game man, and --

"COLLINS: I -- you can use the car, man, but the -- there's heat on the car, man, cause, you know, if -- if they saw it, you know, at that place, you know --

"QUINONES: You worry too much, man, I take good care of my people, like when you keep talking about that night, man, don't worry about this shit, man. Don't even think it man. I don't even like talking about it, man. Shit, I be passin my time like 'sta bien, shit, I ain't even seen -- I ain't even thought bout -- bout it, cause I know what it's going to be cool for me on my side of it, and as far as you side, it's a lot cooler

> than my side, man, cause I got a lot more heat comin looking down at me, and that's just a lot of witnesses seen me, you know what I mean, and they won't, uh, talk if they do find out, you know what I mean, cause they're scared -- scared."

In four basic arguments relating to the use of the tape recording the appellant asserts that the trial court erred: (1) in not permitting discovery of the tape recording, (2) in not granting appellant's motion for a continuance, (3) in not appointing an independent expert to examine the tape; and (4) in admitting the tape in evidence. We will deal with each of these in turn.

The threshold issue in analyzing the discovery question is whether the tape recording was discoverable material within the meaning of Art. 39.14, V.A.C.C.P. Art. 39.14 provides:

> "Upon motion of the defendant showing good cause therefor and upon notice to the other parties, the court . . . may order the State . . . to produce and permit the inspection and copying or photographing by or on behalf of the defendant of any designated documents, papers, written statement of the defendant, (except written statements of witnesses and except the work product of counsel in the case and their investigators, and their notes or report), books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action . . ."

Tape recordings of a statement by the accused are "objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action."

The work product privilege has generally been limited to documents which themselves do not contain admissible evidence of the offense but instead are summaries of the evidence or discussions about the offense that have been prepared for the internal use of law enforcement officers. The privilege has thus been extended to offense or investigative reports prepared

by the police, e.g., Brem v. State, 571 S.W.2d 314 (Tex.Cr.App. 1978); Holloway v. State, 525 S.W.2d 165 (Tex.Cr.App. 1975); internal prosecution files or papers, e.g., Mott v. State, 543 S.W.2d 623 (Tex.Cr.App. 1976); Nelson v. State, 511 S.W.2d 18 (Tex.Cr.App. 1974); and reports on the analysis of narcotics, e.g., Alba v. State, 492 S.W.2d 555 (Tex.Cr.App. 1973); Feehery v. State, 480 S.W.2d 649 (Tex.Cr.App. 1972). It has also been extended to statements prepared by law enforcement officers after interviewing prospective witnesses. Hoffman v. State, 514 S.W.2d 248 (Tex.Cr.App. 1974). However, under the Gaskin rule, statements prepared by witnesses for the State are not privileged after they testify, id.; nor does the privilege extend to any statement that is used before the jury. E.g.,Mendoza v. State, 552 S.W.2d 444 (Tex.Cr.App. 1977). This tape recording contained direct, material evidence about the offense and its contents were dictated by appellant and Collins, not by the police officers. When the police record the incriminating statements of a criminal suspect who subsequently is charged with the offense, there is a substantial probability that, as in this case, these recorded statements will be used at trial and were not meant for strictly internal use. Moreover, if the tape recording contained exculpatory material it would be discoverable as a matter of constitutional right. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In contrast to the recorded statement of an ordinary witness, the work product privilege was not designed for and has not been applied to shield the recorded statements of the accused.

A holding that such recordings could never be discoverable would handicap the trial court in the performance of its duty to effectuate important purposes of pretrial discovery, such as the reduction of surprise and the insurance of a fair trial. The trial court did have the discretionary power to order discovery

of this tape recording. Bates v. State, 587 S.W.2d 121 (Tex. Cr.App. 1979). We also observe that, generally, it is the better practice for the prosecutor to disclose to the defense any written or recorded statements of the defendant that are in his custody. See ABA Standards, Discovery and Procedure Before Trial, Sec. 2.1(a)(ii)(Tent.Draft 1969).

However, appellant does not have a general right to discovery of evidence in the possession of the State, even if the evidence is appellant's own statements. See Cicenia v. LaGay, 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1958); Dowling v. State, 317 S.W.2d 533 (Tex.Cr.App.), cert denied, 358 U.S. 886 (1958). Art. 39.14 makes it clear that the decision on what is discoverable is committed to the discretion of the trial court. The issue, then, is whether the trial court abused its discretion in refusing to allow discovery of the tape recordings. The basis for the ruling by the trial court was incorrect; it was based on the incorrect assumption that no tape recording existed and it was based on the incorrect belief that, even if the tape did exist, it would not be discoverable. But the reasons behind the trial court's exercise of its discretion will not create reversible error if the decision itself, regardless of its purported basis, did not exceed the limits of the court's discretion. Cf. United States v. Agurs, 427 U.S. 97, 108-10, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)(using similar analysis in explaining the appellate role on this issue in the constitutional context).

The legal standard employed in determining whether the trial court abused its discretion is not whether the error was harmless. A trial court is not obligated to allow discovery of evidence merely because its admission will harm the defendant.

Compare Hollowell v. State, 571 S.W.2d 179 (Tex.Cr.App. 1978) with Stone v. State, 583 S.W.2d 410 (Tex.Cr.App. 1979). Instead, Texas has chosen to follow a rule which requires the trial court to permit discovery only if the evidence sought is material to the defense of the accused.

Traditionally, this Court has declined to find reversible errors stemming from discovery if the defendant was not denied access to exculpatory or mitigating evidence which would have affected the outcome of the trial in his favor. See e.g., Granviel v. State, 552 S.W.2d 107 (Tex.Cr.App. 1976), cert. denied, 431 U.S. 933 (1977); Love v. State, 533 S.W.2d 6 (Tex. Cr.App. 1976); Bell v. State, 442 S.W.2d 716 (Tex.Cr.App. 1969); Means v. State, 429 S.W.2d 490 (Tex.Cr.App. 1968); see also Bates v. State, supra. More recently in Stone v. State, 583 S.W.2d 410 (Tex.Cr.App. 1979) and Frank v. State, 558 S.W.2d 12 (Tex. Cr.App. 1977), this Court has expressly chosen to define "materiality" under Texas law in the due process terms employed by the Supreme Court in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), one of the more recent elaborations on the disclosure requirements of Brady v. Maryland, supra.

> "'. . . unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose . . . The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.' The Court stated that the test for materiality imposes a higher burden on the defendant than the harmless error standard. In determining materiality, the omission must be 'evaluated in the context of the entire record,' and constitutional error is committed only 'if the omitted evidence creates a reasonable doubt that did not otherwise exist.'"

Stone v. State, 583 S.W.2d at 415, in part quoting United States v. Agurs, 427 U.S. at 108-10, 112. See also Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972); Garrison v. Maggio, 540 F.2d 1271 (5th Cir. 1976). Keeping this standard in mind, we proceed to apply it to this case.

The tape recording was made during the police investigation of the crime, prior to appellant's arrest; it is not a custodial confession and there is no dispute as to the voluntariness of appellant's recorded statements. More importantly, there are no statements on the tape that are exculpatory in any way. This is not a case where the prosecutor sought to withhold evidence that the defense could have advantageously presented to the jury; it is just the opposite.

Nevertheless, appellant argues that he was prejudiced by the failure to discover the tape recordings because counsel for appellant claim that, had they known of the tapes, they would have accepted a prosecutorial offer to plead guilty in exchange for a recommended life sentence, an offer which had been withdrawn by the time counsel learned about the existence of the tape. This claim of prejudice does not make the tape "material," as that term is defined in Stone and Agurs.

This argument essentially complains of the way in which the prosecutors chose to conduct their plea negotiations, because it means that the prosecutors offered a plea of guilty but, in negotiating for this plea, they chose not to reveal evidence which appellant asserts would have caused their offer to be accepted. We will not indulge in speculation about why the prosecution made this choice during plea negotiations and we will not intervene into that process. The offer of a plea and the circumstances surrounding that offer are generally within

the discretion of the prosecutor. DeRusse v. State, 579 S.W.2d 224 (Tex.Cr.App. 1979). If the prosecutor chooses not to be sufficiently persuasive in making his offer, for whatever reasons, or if he makes no offer at all, the defendant is equally without legal recourse. Additionally, discovery of the State's evidence prior to trial so as to permit more effective plea bargaining is not a component of the constitutional right to effective assistance of counsel. The true focus of analysis returns to the test explained in Stone and Agurs, which is not met in this case.

Appellant also complains that he was generally denied both a fair trial and the opportunity to obtain effective assistance of counsel because of the prosecutor's failure to disclose the existence of the tape recording to the trial judge during the pretrial hearing on the motion for discovery. At the hearing on the motion for new trial, the assistant district attorney testified that at the hearing he had been fully aware of the existence of the tape recording but stated that his answer, "There are none," really was meant to imply that he did not believe there were any tapes that were discoverable. This is equally improper, regardless of the good faith of those involved, since, under the circumstances, discoverability was a decision for the court, not the prosecutor. We do not mean to show approval for this conduct, yet we do not hold that the sanction for it is reversal of this conviction. This problem, and the action to be taken, is primarily within the realm of the trial judge. From the appellate perspective, the inquiry is still whether due process was accorded under the standards already explained. Again, this is not a case of suppression of exculpatory evidence. The evidence was incriminating and the appellant has not shown that he would have gained any exculpatory benefits in the trial of the case from pretrial disclosure.

The second major argument made by appellant concerning the tape recording is that the trial court should have granted his motion for a continuance to examine the tape. This motion was filed after the beginning of trial. Therefore, to obtain a continuance appellant was required to satisfy the trial court that he was surprised "by some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated . . . ." Art. 29.13, V.A.C.C.P.

The motion for continuance was filed on September 26, before the start of the second day of testimony. Appellant asserts that the "unexpected occurrence since the trial began" was the introduction of testimony on September 25 that a tape recording had been made. However, counsel for appellant testified at the hearing on the motion for new trial that they were aware of the existence of the tape as early as September 13, five days before the trial began. Admission of testimony about the tape on September 25 was not an unexpected occurrence during trial. Admission of such testimony could hve been reasonably anticipated. E.g., Jones v. State, 501 S.W.2d 677 (Tex.Cr.App. 1973). Appellant also did not make the showing as to how he would benefit from the continuance. See, e.g., Ewing v. State, 549 S.W.2d 392 (Tex.Cr.App. 1977); Leach v. State, 548 S.W.2d 383 (Tex.Cr.App. 1977). The trial court did not abuse its discretion in denying the motion.

Appellant further contends that the trial court erred in overruling his motion for appointment of an independent expert to review the tape recording to determine its authenticity. This motion was also filed on September 26, well after the beginning of trial. However, even if the motion were timely, appellant has not properly preserved this ground of error for appeal in a motion for new trial.

The primary purpose of the motion for new trial is to bring errors to the attention of the trial court and allow that court an opportunity to act on them before invoking the appellate process. Effectuation of this purpose also helps insure that the record adequately reflects the nature of the error complained of on appeal.

Appellant had no absolute right to a court-appointed independent expert to evaluate the tape. This absolute right has only been extended where the defendant requests an independent examination of the physical evidence of the criminal offense, such as the drugs in a drug possession case. See Terrell v. State, 521 S.W.2d 618 (Tex.Cr.App. 1975); Detmering v. State, 481 S.W.2d 863 (Tex. Cr.App. 1972). Such evidence is legally "indispensable to the State's case." Bates v. State, supra. Tape recordings like the one in this case, while very incriminating, are not so legally indispensable, id.; their exclusion from evidence would not affect the essential proof that appellant committed an offense.

Consequently, to show error in the ruling of the court, appellant was required to show that appointment of the expert was necessary to a fair trial in the case. The tape was well authenticated before its admission into evidence. The State also offered, through testimony, a credible explanation for the fifteen second deletion in the tape and their explanation is consistent with the transcript of the tape in the record. In bringing this matter to the trial court's attention at the motion for new trial, appellant was obligated to show or attempt to show: (1) that an expert was available for the court to appoint and (2) that this expert would have given testimony useful to the defense. See Rodriquez v. State, 513 S.W.2d 22 (Tex.Cr.App. 1974); Parsons v. State, 271 S.W.2d 643 (Tex.Cr.App. 1954); Qualls v. State, 100 S.W.2d 711 (Tex.Cr.App. 1937). Without such a showing, both the trial court and now this Court are being asked to order new trials based on pure speculation.

Appellant did reurge his request for an independent examination of the tape at the hearing on the motion for new trial. The discussion was as follows:

> "MR. SCHNEIDER: In regards to Section 5 under 39.14, I believe we had a right to an expert appointed by the Court to determine the authenticity of the tape. We made that request once when it was introduced into evidence -- or I believe the third day of trial we made a request for appointment of an expert for that purpose. In the case of Derming (phonetic) v. State, in volume 43, S.W.2d, the State said an indigent was entitled to an expert. . . .
>
> "For these reasons we ask the Court to grant our motion for a new trial.
>
> "THE COURT: Does the State have anything?
>
> "MR. HARDIN: . . . As to Paragraph 5, the State would be willing at this time to honor any type of request the defense wants to -- as to experts to check the tape and verify the authenticity and run whatever tests they want on the original tape now in evidence. If the Court would be willing, the State suggests that it is possible for number five. We certainly have nothing to hide as to the authenticity of the tape. If they have an expert on the case it is the State's position, if the Court is willing, they are welcome to it."

Appellant's counsel did not say anything further about the matter. The requisite showing on the availability and potential testimony of the expert was not attempted. Nothing is preserved for review.

The final contention with respect to the tape is that it was improperly admitted into evidence. The predicate for admission of tape recordings into evidence was set forth in Edwards v. State, 551 S.W.2d 731 (Tex.Cr.App. 1977):

> ". . . (1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the device was competent, (3) establishment of the authenticity and correctness of the recording, (4) a showing that changes, additions or deletions have not been made, (5) a showing of the manner of the preservation of the recording, (6) identification of the speakers, and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement."

Id. at 733. The Edwards court added that some of these requirements did not need direct proof if they could be inferred from the testimony. Id.

Appellant argues that the predicate was defective because the tape had been altered by the fifteen second tapeover and because there was no showing that the statements of Richard Wayne Collins were voluntary. At the time this tape was introduced into evidence, appellant objected, stating:

> "We would renew all our previous motions and objections to the admissibility of State's Exhibit 39 and previously heard prior to yesterday, your Honor, and also in the courtroom yesterday afternoon."

This objection did not inform either the trial judge or the prosecutor which of the seven Edwards requirements had specifically not been met. As in Harris v. State, 565 S.W.2d 66 (Tex. Cr.App. 1978), we hold that the objection to admission of the tape was "too general to preserve error." Id. at 70.

In addition, the Edwards requirements do not mean that any alteration in a tape renders the tape per se inadmissible. If the alteration is accidental and is sufficiently explained so that its presence does not affect the reliability and trustworthiness of the evidence, the recording can still be admitted. The trial court did not abuse its discretion in accepting the explanation for the alteration in this case.

There was also no need to prove that the recorded statements of Collins were voluntary. The relevant statements were those made by appellant. The voluntariness of those statements, made by appellant before his arrest or apprehension, is not questioned.

Appellant further argues that admission of the tape recording was an unconstitutional denial of his right to confront and cross-examine Richard Wayne Collins under Bruton v. United States,

391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Bruton held that it was improper to use the confession of a co-defendant to inculpate the defendant in their joint trial where the codefendant does not take the stand. We doubt that the statements of Collins in the recorded conversation constitute a confession. In any event, this case does not present a Bruton problem because appellant is definitely inculpated by his own statements in the recording, not those of his codefendant. Cf. Parker v. Randolph, ___U.S.___, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979) (plurality opinion) (admission of defendant's "interlocking" confession allows admission of nontestifying codefendant's confession). The damage which the recorded statements of Collins may have added to that done by appellart to himself, along with the other incriminating evidence, is so relatively insignificant that the admission of these statements was harmless error. See Parker v. Randolph, 99 S.Ct. at 2141-43 (1979) (Blackmun, J., concurring); Schneble v.Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972); Harrington v. California, 395 U.S. 250, 89 S.Ct. 1116, 23 L.Ed.2d 384 (1969); Simpson v. Wainwright, 439 F.2d 948 (5th Cir.), cert. denied, 402 U.S. 1011 (1971); Carey v. State, 455 S.W.2d 217 (Tex.Cr.App. 1970).

Returning to consideration of appellant's remaining grounds of error, appellant contends that the indictment was duplicitous. The indictment charged that appellant did "while in the course of committing and attempting to commit kidnapping and robbery, intentionally cause the death of Mohamad Ali Vahdat . . . ." Appellant argues that this indictment charges two different offenses by charging two of the different aggravating circumstances which make this a capital murder. In the context of a similar capital murder indictment, this Court has considered and

rejected appellant's contention. Jurek v. State, 522 S.W.2d 934, 941 (Tex.Cr.App. 1975), aff'd, 428 U.S. 262 (1976), habeas corpus relief granted on other grounds, 593 F.2d 672 (5th Cir.), reh. en banc granted, 597 F.2d 590 (5th Cir. 1979). Appellant urges that under Art. 21.24(b), V.A.C.C.P., each distinct offense must be alleged in a separate paragraph. This indictment alleges only one distinct offense. Jurek v. State, supra.

Appellant next complains that the trial court erred in refusing to allow appellant to view and inspect the 7.65 mm. (approximately .30 caliber) automatic pistol which Collins gave to the police. The officer who received the pistol incorrectly described it as a .38 caliber weapon. This pistol was admitted into evidence after Leal identified it as the pistol which appellant had in his possession at the time the ice cream truck was hijacked, although Leal described the pistol, slightly inaccurately, as a .32 caliber automatic. Leal's identification of the pistol was not challenged at the trial. The pistol was properly admitted as demonstrative evidence of the pistol which appellant was carrying at the time Leal witnessed his activities.

There was no eyewitness testimony about the murder of Vahdat. The record does not show any direct evidence as to whether the 7.65 mm. pistol was the murder weapon. The expert testimony was that the fatal bullet could have ranged from .25 to .38 in caliber. The fatal bullet was never recovered. A search of the general vicinity where the body was found, a rural area outside of Houston, yielded some old hulls from a .38 caliber police special and some expended shotgun shells; but no bullets or shells were ever recovered that were linked to the killing or to the pistol introduced at trial.

The legal standards for review of the trial court's rulings on discovery and inspection of evidence have already been discussed. Discovery or inspection of this pistol could not have

resulted in any exculpatory benefit for appellant. Since the State never proved that the pistol was the murder weapon and never found a fatal bullet, ballistics comparisons would have been fruitless. At best, appellant might have hoped to prove that the 7.65 mm. pistol was not the murder weapon. But even this conclusion would not have benefited appellant since a link between the 7.65 mm. pistol and the murder was unimportant to the State's case against appellant. We therefore conclude that the trial court did not abuse its discretion in failing to allow discovery or order independent ballistics examination of the pistol.

Appellant also contends that the charge given to the jury at the close of the guilt phase of the trial failed to define capital murder. The charge gave the abstract definitions for intentional conduct, robbery, and kidnapping and then applied the law to the facts as follows:

> "Now, therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, JOHN HENRY QUINONES, did, in Harris County, Texas, on or about June 15, 1978, while in the course of committing or attempting to commit robbery or kidnapping, intentionally cause the death of Mohamed Ali Vahdat, by shooting him with a gun, you will find the defendant guilty of the offense of capital murder and so say by your verdict."

This charge required the jury to find all of the constituent elements of the offense of capital murder in order to return a guilty verdict. Appellant argues that the charge does not define the offense of murder. This is incorrect. Murder was defined in that portion of the charge which applied the law to the facts and, with the exception of the culpable mental state which the court did define elsewhere, the definition employed terms of common understanding. Appellant did not raise this objection to the court's charge at trial and no fundamental error is shown.

At the punishment phase, appellant alleges that error was committed in admitting evidence that appellant committed an extraneous offense, namely, the armed robbery of an adult book store. Evidence of unadjudicated extraneous offenses can be admitted in the punishment phase of a capital murder trial. Garcia v. State, 581 S.W.2d 168 (Tex.Cr.App. 1979). Appellant claims, however, that he was given no notice that the State intended to present evidence of this offense and that he was thus denied an opportunity to effectively cross-examine John Brevelle, the employee of the adult bookstore who testified to the crime.

Rusty Hardin, an Assistant District Attorney for Harris County, testified that the State did not know that Brevelle would testify until that day. Before that day, their only knowledge of the offense was a one page offense report in their file, which the defense attorneys had been allowed to review, that mentioned the robbery. The State's testimony on this issue is reproduced at length in order to detail the unusual circumstances behind the admission of this testimony. Mr. Hardin testified:

> ". . . This witness was talked to by representatives of the State for the first time this afternoon around 2:00 o'clock. He was shown a photo display which until 3:00 o'clock today we had no intention of using or even talked about and he identified the defendant, John Henry Quinones, and informed us that not only was he the man who robbed him but was the same man he earlier attended a lineup with on July the 12th or 13th of this year and identified.
>
> "At that time in the State prosecutors' files the only thing that existed about the case was a single page offense report which mentioned the robbery. When he told us he had attended a lineup in the past on this case we were unfamiliar with, we sent an investigator over to the Houston Police Department Records Division and pulled the entire offense report supplement. He brought that back over here at approximately 3:00 o'clock this afternoon and from that we determined that in fact this witness had previously identified John Henry Quinones in a lineup on July the 12th or 13th of this year but no charges were filed. That is the first time we knew that we had this man available as a witness and even possibly would call him at the punishment stage approximately an hour and a half ago.

* * * *

"Q. [by Mr. Collins, a defense attorney]: Isn't it a fact in the offense report Art Collins, the same detective who worked on this case, was also the officer that evidently talked to these witnesses?

"A. [by Mr. Hardin]: Yes.

"Q. And showed him photographs of the defendant?

"A. Yes.

"Q. Was that information within the District Attorney's file at the time of our motion hearing in July?

"A. It was not in the D.A.'s file. I discovered there were three possible extraneous robberies committed by your man due to a confession of a co-defendant. When we went to check on those robberies about a week or so before preparing for trial, we determined in two of them no identifications. So we dropped them. That in the third one, which is this one, the one witness had given a tentative I.D. on photo but Art Collins had not followed up on it. His understanding to me was he didn't think there had ever been a lineup. There was supposed to be. He checked the files ten days ago and said that no, there never was a lineup. We assumed we did not have an I.D. on the third robbery of the adult bookstore until we found out today.

"Q. When was the subpoena issued for Mr. Brevelle?

"A. He is in response to a phone call from the District Attorney's Office at approximately 2:00 o'clock. He was met by representatives of the District Attorney's Office for the first time today around 2:30 or 3:00 o'clock and with all assurance he was never met or talked to a District Attorney about this case until this afternoon."

The State did not act in bad faith in its failure to give appellant advance notice of the testimony of Brevelle.

Under these circumstances, appellant may have been entitled to a continuance under Art. 29.13, V.A.C.C.P., to have additional time to prepare a response to this evidence, which the State concedes was material and unexpected. However, appellant did not request a continuance. The absence of a request for a continuance deprived the trial court of an opportunity to properly

remedy the surprise complained of by appellant. See Graves v. State, 144 S.W. 961 (Tex.Cr.App. 1912); Bryant v. State, 33 S.W. 978 (Tex.Cr.App. 1896). Without such a request, nothing is presented for review. Hubbard v. State, 496 S.W.2d 924 (Tex. Cr.App. 1973).

Finally, appellant contends that, in the punishment phase, the jury should have been charged that: "Evidence presented in mitigation of the penalty may be considered should the jury desire, in determining the answer to any of the special issues." Appellant submitted two jury charges incorporating this language and both were denied. The trial court submitted the special issues as prescribed in Art. 37.071, V.A.C.C.P., without explanation of their terms.

Appellant correctly claims a right to consideration of mitigating circumstances by the jury deciding whether or not to impose the death penalty and he argues that the explanatory charge he requested is necessary to protect this right. We disagree with this conclusion. The Supreme Court has affirmed that under the Texas capital sentencing statute: "the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it." Jurek v. Texas, 428 U.S. 262, 273, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced." 428 U.S. at 276. While invalidating an Ohio death penalty statute for its failure to permit adequate consideration of mitigating factors, the Supreme Court favorably contrasted the Texas law which: "survived the petitioner's Eighth and Fourteenth Amendment attack because three Justices concluded that the Texas Court of

Criminal Appeals had broadly interpreted the second question - despite its facial narrowness - so as to permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show." Lockett v. Ohio, 438 U.S. 586, 607, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), citing to Jurek v. State, 522 S.W.2d at 939-40.

Appellant was entitled to present evidence of any mitigating circumstances and did present such evidence, including a broad discussion of his personal and family background. The question then is whether the language of the special issue is so complex that an explanatory charge is necessary to keep the jury from disregarding the evidence properly before it. In King v. State, 553 S.W.2d 105 (Tex.Cr.App. 1977), cert. denied, 434 U.S. 1088 (1978), this Court held that the questions in Art. 37.071 used terms of common understanding which required no special definition. The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence. No additional charge is required. The ground of error is overruled.

The judgment is affirmed.

DALLY, Judge

(Delivered January 9, 1980)

En Banc

JOHN HENRY QUINONES, Appellant

NO. 62,117 VS. - - - - - - Appeal From HARRIS County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

I dissent. The judgment should be reversed because concealment of the incriminating tape recording denied appellant his constitutionally protected right to effective assistance of counsel.

The Court's analysis of disclosure in terms of Brady v. Maryland is wholly inappropriate. As the Court suggests, materiality in due process terms refers to the discovery of matters exculpatory in nature. Materiality under V.A.C.C.P., Article 39.14, however, has been nowhere so defined. It should be abundantly clear from even a cursory reading of Article 39.14 that the Legislature intended no such restrictive definition and that Article 39.14 was not meant to be a mere codification of Brady v. Maryland. Materiality in the context of Article 39.14 should be accorded its commonly understood legal meaning. As said in Weinstock v. United States, 231 F.2d 699, 701 (D.C. Cir. 1956), "[T]o be 'material' means to have probative weight: i.e., reasonably likely to influence the tribunal in making a determination required to be made." Accordingly, the cases cited by the Court are inapposite. The Legislature has chosen, by enacting Article 39.14, to authorize a broader range of discovery than the minimum due process requirements of Brady v. Maryland.

The Court peremptorily dismisses appellant's claim that his right to effective assistance of counsel was infringed upon, saying that "... discovery of the State's evidence prior to trial so as to permit more effective plea bargaining is not a component of the constitutional right to effective assistance of counsel."

I do not suggest that we should elevate plea bargaining to the status of a constitutionally protected right. I am of the view, nonetheless, that the Sixth Amendment mandates that defense counsel not be unduly hampered in the exercise of his obligation to effectively represent his client. This is so no matter what aspect of a criminal prosecution is the immediate focus of counsel's advice to his client. Accordingly, where, as here, information which is properly within the compass of discovery is denied defense counsel because of an affirmative act of misconduct on the part of the State, the defense function is crippled to the extent the information concealed has a bearing on the advice counsel might have given. To declare that counsel should have available to him, as a basis for advice to his client, all information to which he is legally entitled is to announce no new theory of law. As stated in American Bar Association, Standards Relating to the Defense Function, 227 (Approved Draft 1971), "The relationship of effective investigation by the lawyer to competent representation at trial is patent, for without adequate investigation he is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial or to conduct plea discussions effectively." (emphasis supplied). Quite clearly, the prosecutorial behavior of which we speak here represents an unwarranted interference with the discharge of defense counsel's duty to investigate.

It is no answer to say that the trial court could have, in the exercise of his discretion under Article 39.14, denied discovery, even had he been made aware of the existence of the tape recording. Judicial discretion is not a mere intellectual exercise which can be invoked by advertence to a hypothetical state of facts. If the trial court was led to believe, as he was, that no tape recording existed, then he cannot be said to have exercised discretion as to its discovery.

Moreover, the record is clear that the trial court erroneously believed that permitting discovery of the tape was not even within his discretion. Accordingly, the Court's citation to authority holding that discretion exercised for the wrong reason will not vitiate a judgment based thereon, so long as the decision reached is within the permissible bounds of discretion generally, has no application in this case. The anomaly of suggesting that a trial court exercised discretion when he thought the exercise of discretion was not within his power should be apparent.

The Court relies strongly on the authority of cases which deal with the failure of the State to reveal the existence of Brady material. As I have stated heretofore, the Brady standard has no application to discovery under V.A.C.C.P., Article 39.14. What is more important is that the case at bar presents no mere failure to disclose. The record reveals a deliberate misrepresentation by the prosecution.

Where the record reveals affirmative misconduct on the part of the prosecution, compounded by an erroneous trial court ruling, we should not require a showing of great harm to find reversible error. Particularly should this be so where we review the record of a capital case, which is qualitatively different from a noncapital case. Gregg v. Georgia, 428 U.S. 153 (1976). We are not here faced with a mere failure to disclose Brady material. Neither are we simply faced with a failure to make disclosure under Art. 39.14. What we are confronted with is a misrepresentation. The State offered to recommend a life sentence in exchange for appellant's plea of guilty. It affirmatively misrepresented the strength of its case. As a result, appellant's counsel were misled when they advised their client on his plea, which represented a life or death decision.

QUINONES, 4. (Dissent)

I would hold that appellant was denied the right to effective assistance of counsel and would, accordingly, reverse the judgment and remand the cause for a new trial.

Roberts, Judge

DELIVERED: January 9, 1980

EN BANC

Phillips, J., joins in this dissent.

JOHN HENRY QUINONES, Appellant

NO. 62,117 vs. - - - - Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

I join the conclusion that this conviction must be reversed for the underlying factual events relied on by Judge Roberts in his dissent. I differ from his conclusion only in that I would hold those facts support a finding of prosecutorial misconduct, instead of ineffective assistance of counsel. The root cause for the miscarriage in this case was not ineffectiveness on the part of appellant's counsel; it was the misrepresentation made by the prosecutor. Cf. Ruth v. State, 522 S.W.2d 517. No cloud should be cast on appellant's counsel for placing reliance on the representations of another professional. This conviction should be reversed for prosecutorial misconduct. I dissent to its affirmance.

ODOM, Judge

(Delivered January 9, 1980)

En Banc

Clinton, J. joins this opinion

APPENDIX B

CHARGE OF THE COURT ON ASSESSMENT OF PUNISHMENT

FILED: SEPTEMBER 29, 1978

CAUSE NO. 281,745

STATE OF TEXAS	I	IN THE 262ND DISTRICT COURT
	I	
VS.	I	OF
	I	
JOHN HENRY QUINONES	I	HARRIS COUNTY, T E X A S

MEMBERS OF THE JURY:

By your verdict returned in this case you have found the defendant, John Henry Quinones, guilty of the offense charged in the indictment. It is now your duty to consider the matter of punishment.

In connection with your consideration of the evidence presented with respect to the question of punishment, I am submitting to you certain issues to be determined by you in accordance with instructions which I shall give you. The state must prove each issue submitted beyond a reasonable doubt, and you shall return a special verdict of "Yes" or "No" on each issue submitted.

You are further instructed that you may not answer any issue "Yes" unless you agree thereon unanimously; and you may not answer any issue "No" unless ten (10) or more jurors agree.

If the jury returns an affirmative finding on each issue submitted below, the Court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted below, the Court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, John Henry Quinones, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

ANSWER: Yes

ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, John Henry Quinones would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER: Yes

Under the instructions herein given, it will not be proper for you, in determining the answers to the foregoing issues, to answer the same by lot, chance, or any system of averages, or any other method than by a full, fair, and free exercise of the opinion of the individual jurors under the evidence submitted to you.

You are not to discuss among yourselves how long the defendant would be required to serve the sentence that may be imposed by the Court. Such matters come within the exclusive jurisdiction of the Board of Pardons and Paroles and the Governor and are no concern of yours.

You are the exclusive judges of the facts proved and the credibility of the witnesses and the weight to be given their testimony, but you are bound to receive the law from the court which has been given you, and you are bound thereby.

Judge Presiding

80-5053

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IN THE

SUPREME COURT OF THE UNITED STATES

April Term

JOHN HENRY QUINONES,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

No. 80-5053

PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

NOW COMES JOHN HENRY QUINONES, by and through his attorney, STANLEY G. SCHNEIDER, and would show the Court that JOHN HENRY QUINONES is totally indigent and is unable to pay filing fees for the filing of his application for writ of certiorari. To the best of the undersigned attorney's knowledge Petitioner has no funds with which to pay said fees in this cause, due to his incarceration. The Petitioner has filed Pauper's Affidavit at the trial level and state appellate level. A Pauper's Affidavit will be forthcoming from Petitioner.

Respectfully submitted,

DOHERTY, VELA, POSER,
SEARS and COLLINS

STANLEY G. SCHNEIDER
2225 LaBranch
Houston, Texas 77002
(713) 652-5711
ATTRONEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE ME on this the 11th day of July, 1980.

MARY THWEATT
Notary Public in and for Harris County, Texas
My Commission Expires 6-1-84

NOTARY PUBLIC IN AND FOR
HARRIS COUNTY, T E X A S

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above statement has been delivered to Anita Ashton, Assistant Attorney General, Attorney General's Office, Austin, Texas, 78710, via U.S. mail, with sufficient postage affixed thereto on this 11th day of July, 1980.

STANLEY G. SCHNEIDER